IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

FRED HENRY BEALE — APPELLANT

VS. — NO. 2007-KA-0190

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

The grand jury in the First Judicial District of Hinds County indicted defendant, Fred Henry Beale for Capital Murder in violation of *Miss. Code Ann.* § 97-3-19(2)(e). (Indictment, cp.3). After a trial by jury, Judge W. Swan Yerger presiding, the jury found defendant guilty. (C.p.39-408). Defendant was sentenced to Life in the custody of the Mississippi Department of Corrections. (Sentence order, cp. 40).

After denial of post-trial motions this instant appeal was timely noticed.

STATEMENT OF FACTS

Defendant went to the apartment of a female friend (with whom he had a previous relationship). He was determined to see her and talk to her. He was so determined he marched up and pounded on the front door. When she didn't answer fast enough he kicked in the door, and armed with a revolver in his hand, confronted her and beat her about the head with the gun. He then turned to the bedroom and shot a man lying in the bed. Defendant then left the apartment. The jury heard the evidence and found defendant guilty of murder.

SUMMARY OF THE ARGUMENT

I.

DEFENDANT WAS NOT ENTITLED TO A SELF-DEFENSE INSTRUCTION.

Issue II.

BECAUSE HE ARMED HIMSELF WITH A GUN DEFENDANT DEPRIVED HIMSELF OF ANY CLAIM OF SELF-DEFENSE.

Issue III.

DEFENDANT WAS NOT ENTITLED TO ARGUE SELF-DEFENSE AS A MATTER OF LAW.

Issue IV.

DEFENDANT WAS NOT ENTITLED TO A MANSLAUGHTER INSTRUCTION.

Issue V.

THE RECORD IS VOID OF ANY IMPARTIALITY OF THE TRIAL COURT.

Issue VI.

THERE WERE NO ERRORS SINGLY, CUMULATIVE OR IN THE AGGREGATE THAT WARRANT THE REQUESTED RELIEF.

ARGUMENT

I.

DEFENDANT WAS NOT ENTITLED TO A SELF-DEFENSE INSTRUCTION.

In this initial allegation of error counsel on appeal seeks to cloud the issues by alleging the lower courts legitimate and correct denial of a self-defense instruction was equivalent to finding him guilty of burglary.

And, a quick look to the record indicates the trial court, correctly denied defense requests for a self-defense instruction – which is the essential claim raised in this first issue.

> ¶ 16. "In determining whether error lies in the granting or refusal of various instructions, the instructions actually given must be read as a whole. When so read, if the instructions fairly announce the law of the case and create no injustice, no reversible error will be found." Johnson v. State, 823 So.2d 582, 584(¶ 4) (Miss.Ct.App.2002) (quoting Hickombottom v. State, 409 So.2d 1337, 1339 (Miss.1982)). Defendants do not have an absolute right to have their jury instructions granted. "A defendant is entitled to have jury instructions given which present his theory of the case, however, this entitlement is limited in that the court may refuse an instruction which incorrectly states the law, is fairly covered elsewhere in the instructions, or is without foundation in the evidence." Heidel v. State, 587 So.2d 835, 842 (Miss.1991).
>
> *Garrett v. State*, 956 So.2d 229 (Miss.App. 2006).

Looking to the record it is clear defendant (from his own testimony) did in essence admit to the burglary. Additionally as reiterated in *Garrett* the giving of the State's instruction that the state must prove the element "...not in necessary self-

defense" is legally sufficient to instruct the jury on the proof required by the State. *Dobbs v. State*, 936 So.2d 322,¶¶8-10 (Miss. 2006).

On appeal it would appear defendant seeks to argue his claim of self-defense that arose *after* he had broken into the apartment would somehow go back in time and justify his breaking and entering. They are separate crimes and the second does not cleanse the first.

Consequently, the trial court was correct, the jury was adequately instructed on the element of necessary self-defense to acquit and there is no error in this first allegation.

Issue II.
BECAUSE HE ARMED HIMSELF WITH A GUN DEFENDANT DEPRIVED HIMSELF OF ANY CLAIM OF SELF-DEFENSE.

Again, in this second issue defendant seeks to direct attention to the gun the dead man supposedly wielded. The facts and the law, point to a more salient truth. That being that defendant himself admitted to kicking in the door to an apartment, entering with a revolver in his hand, and hitting a woman. (Tr. 319-320) Ok, that pretty much in less than two pages of transcript legally disallows any claim defendant may have of self-defense.

> ¶ 32. However, this Court has held that "[i]f a person provokes a difficulty, arming himself in advance, and intending, if necessary, to use his weapon and overcome his adversary, he becomes the aggressor, and deprives himself of the right of self-defense." Parker v. State, 401 So.2d 1282, 1286 (Miss.1981).
>
> *Chandler v. State,* 946 So.2d 355 (Miss. 2006).

Therefore, it never was a question of self-defense – defendant himself made that decision and could not at trial claim something else. Legally end of argument.

Therefore, defendant, by his own testimony having entered the fray armed was not entitled, by law to a self-defense instruction. No relief should be granted on this allegation of error.

Issue III.

DEFENDANT WAS NOT ENTITLED TO ARGUE SELF-DEFENSE AS A MATTER OF LAW.

> ...The law tolerates no justification and accepts no excuse for an assault with a deadly weapon on the pleas of self defense except that the assault by the defendant on the victim was necessary or apparently so to protect the defendant's own life or his person from great bodily injury and there was immediate danger of such design being accomplished....
>
> *Clark v. State,* 928 So.2d 192 (¶20)(Miss.App. 2006).

So, looking to the transcript, defendant testifies he is assaulting, or has just hit a woman with a gun and then he turns and shoots a man with that same gun. We must look to the assault he was committing at the time – the woman. The trial court, the prosecutor and the jury heard the facts and self-defense – since defendant entered the premises gun in hand was not knowing of any danger is not entitled – by law, to any claim of self-defense.

Consequently, the trial court was correct in sustaining each objection when the issue was improperly raised at trial or closing argument.

There was no error at trial and no relief should be granted.

Issue IV.

DEFENDANT WAS NOT ENTITLED TO A MANSLAUGHTER INSTRUCTION.

Within this allegation of error it would appear defendant asserts it was trial court error to deny proffered manslaughter instructions. Specifically defendant claims the State argued defendant was angry so he should have a heat of passion manslaughter instruction. And, that he should have been given an "imperfect self-defense" manslaughter instruction.

As to the first claim that he was angry over what was said, and the hanging up of the phone (which the State argued).

> ¶ 11. . . . The law is well-settled that words alone are not enough to require a heat of passion manslaughter instruction. Myers v. State, 832 So.2d 540, 542(10) (Miss.Ct.App.2002). Pushing or shoving is also insufficient to require the instruction absent testimony that the defendant was acting out of violent or uncontrollable rage. Turner v. State, 773 So.2d 952, 954(8) (Miss.Ct.App.2000). In the case sub judice, the record indicates nothing more than a verbal argument and perhaps some pushing, tussling, and/or choking "a little bit." Neither Hudson nor Hardy testified in detail about the verbal or physical altercation, and neither testified that Cooper was in a state of violent and uncontrollable rage.

Cooper v. State, 2007WL 2994347, *2 -3 (Miss.App.,2007)

Defendant was not entitled to any heat of passion manslaughter instruction even based upon his testimony.

Second, the law is clear:

> ¶ 11. Phillips's argument in support of the manslaughter instruction was that he lacked the intent, or deliberate design, to commit murder.FN2 ***We have held that "malice, or deliberate design, may be inferred from use of a deadly weapon.*** Id. at 1263 (emphasis in the original) (citing Tran v. State, 681 So.2d 514, 517-18 (Miss.1996); Day v. State, 589 So.2d 637, 642 (Miss.1991); Wilson v. State, 574 So.2d 1324, 1337 (Miss.1990); McGowan v. State, 541 So.2d 1027, 1030 (Miss.1989); Nicolaou v. State, 534 So.2d 168, 171-72 (Miss.1988); Russell v. State, 497 So.2d 75, 76 (Miss.1986); Dickins v. State, 208 Miss. 69, 92, 43 So.2d 366, 373 (1949)).
>
> *Phillips v. State,* 794 So.2d 1034 (Miss. 2001)(emphasis added)

So as in *Phillips*, there is the inference defendant had criminal intent as evidence by his own testimony to kicking in the door and assaulting the woman with the revolver he had in his hand. There are no facts supporting any claim of imperfect self-defense.

No relief should be granted on this allegation of error.

Issue V.

THE RECORD IS VOID OF ANY IMPARTIALITY OF THE TRIAL COURT.

Penultimately, defendant asserts a pattern by the trial judge evincing bias and pre-judgment throughout the trial on the part of the trial judge.

> ¶ 12. The law in Mississippi pertaining to the recusal of a judge has been amply addressed. Under Canon 3 E(1) of the Code of Judicial Conduct, "[j]udges should disqualify themselves in proceedings in which their impartiality might be questioned by a reasonable person knowing all the circumstances...." Rutland v. Pridgen, 493 So.2d 952, 954 (Miss.1986). The decision to disqualify, however, remains in the discretion of the trial judge, Cashin v. Murphy, 138 Miss. 853, 859, 103 So. 787, 790 (1925), and this Court "will not order recusal unless the decision of the trial judge is found to be an abuse of discretion." M.R.A.P. 48B; McLendon v. State, 187 Miss. 247, 254, 191 So. 821, 823 (1939).

King v. State, 897 So.2d 981 (Miss.App. 2004).

Now, to be sure, appellate counsel has listed 21 instances of the trial court rulings claiming prejudice and bias.

Overall looking at the examples it was usually the actions of trial defense counsel trying to stretch the envelope and extend his opening statement to voir dire or to expand on his definition of 'reasonable doubt' as opposed to what the law said; or to bring the attention of the jury irrelevant evidence. Much of which was covered pre-trial outside the presence of the jury.

Trial counsel was being an aggressive advocate for his client. The fact that the prosecution objected and the judge ruled does not show trial court bias or prejudice.

It shows consistency in rulings and applicability of the law to ensure the jury hears relevant evidence and is properly instructed. The fact the judge did it a couple of dozen times over the course of a trial that lasted over a span of three days, is not error.

It is the succinct contention of the State that defendant has raised no argument to overcome the presumption of the trial court's fair and impartiality throughout the total trial. No relief should be granted on this allegation of error.

Issue VI.

THERE WERE NO ERRORS SINGLY, CUMULATIVE OR IN THE AGGREGATE THAT WARRANT THE REQUESTED RELIEF.

Lastly defendant claims cumulative or aggregate error requires reversal for a new trial. As has been previously discussed under the individual propositions, no reversible error was committed in the trial of this case. Defendant contends the prejudicial impact of the 'errors' denied him a fair trial. However, defendant does not tell the Court or the State what errors should be considered in making this analysis.

The State submits that since there are no reversible errors in this trial, there can be no cumulative error that necessitates reversal on this assignment. In *Foster v. State*, 639 So.2d 1263 (Miss. 1994), addressing a similar claim, this Court stated:

...[defendant] does not provide a listing of the "near errors" he found in the record. We are left to create this list ourselves. As previously discussed under the individual propositions, no reversible error was committed in the trial of this case. We find no "near errors" in either phase of this trial, so we find no cumulative error. Mullen v. Blackburn, 888 F.2d 1143, 1147 (5th Cir. 1987)(Court of Appeals rejects argument that even if no individual claim entitles petitioner to relief, the claims collectively do [not] and states that "twenty times zero equals zero.").

639 So.2d at 1263.

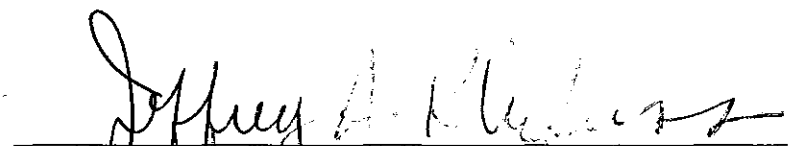
The State submits defendant was not denied a fair trial in this case.

CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal the State would ask this reviewing court to affirm the jury verdict and sentence of the trial court.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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CERTIFICATE OF SERVICE

I, Jeffrey A. Klingfuss, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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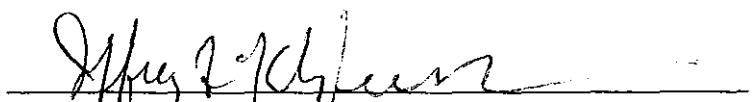
This the 7th day of January, 2008.



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